

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Unbundled Access to Network Elements)	WC Docket No. 04-313
)	
Review of the Section 251 Unbundling)	CC Docket No. 01-338
Obligations of Incumbent Local Exchange)	
Carriers)	

**COMMENTS OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
ON NOTICE OF PROPOSED RULEMAKING**

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I. INTRODUCTION AND SUMMARY

On August 20, 2004, the Federal Communications Commission ("Commission") issued a Notice of Proposed Rulemaking ("NPRM")¹ which, *inter alia*, "encourage[d] state commissions and other parties to file summaries of the state proceedings" that had been commenced in response to the Commission's *Triennial Review Order*.² Those proceedings addressed instances in which the Commission required the states to make decisions on unbundled network elements ("UNEs") based on the conditions set in the *Triennial Review Order*.

The Office of the Ohio Consumers' Counsel ("OCC")³ hereby submits the requested

¹ FCC 04-179 (rel. August 20, 2004). The NPRM was published in the Federal Register on September 13, 2004. See 69 Fed. Reg. 55111.

² *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*"), ¶¶ 187-190, 328-340, 394-418, 486-527, *corrected by Errata*, 18 FCC Rcd 19020 (2003).

³ The OCC is the state agency designated by Ohio law to represent the interests of residential utility consumers before state and federal regulators and in the courts. See Ohio Rev. Code Chapter 4911.

summary of certain of the proceedings conducted by the Public Utility Commission of Ohio ("PUCO"). Those proceedings included three PUCO cases in which the OCC participated.⁴ **The OCC submits that the record of these proceedings is sufficient for this Commission to find that, for residential customers, there is impairment for unbundled local switching ("ULS") throughout the SBC Ohio Inc. ("SBC Ohio") and Cincinnati Bell Telephone Company ("CBT") territories.**⁵

None of the PUCO cases included a final order of the PUCO.⁶ In support of these comments, the OCC includes three affidavits: of Dr. Ben Johnson, a consulting economist (Attachment A, "Johnson Affidavit"); of Karen Hardie, the OCC Telecommunications Industry Team leader (Attachment B, "Hardie Affidavit"); and of Kathy Hagans, Principal Rate Analyst of the OCC (Attachment C, "Hagans Affidavit"). All of the affiants were witnesses for the OCC in the PUCO proceedings.

These comments focus on issues crucial to the residential consumers that the OCC represents, specifically issues concerning local switching. ULS represents the first of the three

⁴ PUCO Case Nos. 03-2040-TP-COI, *In the Matter of the Implementation of the Federal Communications Commission's Triennial Review Regarding Local Circuit Switching* ("PUCO Case 03-2040"); Case No. 04-34-TP-COI, *In the Matter of the Implementation of the Federal Communications Commission's Triennial Review Regarding Local Circuit Switching in SBC Ohio's Mass Market*, ("SBC Ohio Case"); PUCO Case No. 04-35-TP-COI, *In the Matter of the Implementation of the Federal Communications Commission's Triennial Review Regarding Local Circuit Switching in Cincinnati Bell Telephone Company's Mass Market* ("CBT Case"). Because of the OCC's representation of residential consumers, the OCC did not participate in the PUCO's proceeding on enterprise loops and dedicated transport. *In the Matter of the Implementation of the Federal Communications Commission's Triennial Review Regarding High Capacity Loops and Dedicated Transport*, PUCO Case No. 03-2041-TP-COI.

⁵ A more limited finding of nonimpairment would apply for service to small business customers.

⁶ In the 03-2040 proceeding, the PUCO reached tentative conclusions on geographic markets. PUCO Case 03-2040, Opinion and Order (January 14, 2004) at 24. See [http://dis.puc.state.oh.us/cgi-bin/CMWebCGI.exe?ItemID=SIY7\\$JQHWDI6IL\\$W](http://dis.puc.state.oh.us/cgi-bin/CMWebCGI.exe?ItemID=SIY7$JQHWDI6IL$W).

elements that make up the unbundled network element platform (“UNE-P”), which is the source of more than 90% of the residential local service competition seen in Ohio.⁷ This Commission found that there was impairment for unbundled shared transport, the second element of the UNE-P, based on its finding for ULS. Finally, the Commission found on a nationwide basis that competitors were impaired without access to unbundled loops (“UNE-L”), the third element of the UNE-P. No party challenged the finding of impairment for mass market UNE-L.

The PUCO examined impairment for unbundled mass market local switching in 03-2040, the *SBC Ohio Case* and the *CBT Case*. The record from the Ohio proceedings shows clearly that the Commission’s consolidation of residential and small business customers into a single “mass market” product market improperly masked the lack of facilities-based competition for residential customers with the relatively greater degree of such competition for small business customers. Any truly granular analysis should address residential and small business customers as separate product markets.⁸

Further, the record from the Ohio proceedings shows conclusively that under the impairment tests adopted by the Commission in the *Triennial Review Order*, 1) only two Ohio incumbent local exchange carriers (“ILECs”) -- SBC Ohio and CBT -- saw fit to challenge the Commission’s national finding of impairment for mass market switching; 2) of those two, SBC Ohio attempted to demonstrate that there was actual facilities-based competition in its territory for mass market customers, but the record showed that, in fact, for residential customers specifically, such competition did not meet the Commission’s trigger tests anywhere in the SBC

⁷ See 01-338, NASUCA ex parte filing (February 13, 2004) at 2.

⁸ See Johnson Affidavit, ¶¶ 23-35.

Ohio territory;⁹ and 3) CBT attempted to show that there was a *potential* for facilities-based competition for mass market customers, but the record showed, in fact, that, for residential customers specifically, such competition would be uneconomic.¹⁰

In the NPRM, the Commission also solicited comment on alternative unbundling rules that would implement the obligations of section 251(c)(3) of the Communications Act of 1934, as amended,¹¹ in a manner consistent with the U.S. Court of Appeals for the District of Columbia Circuit's decision in *United States Telecom Ass'n v. FCC*.¹² The National Association of State Utility Consumer Advocates ("NASUCA"), of which the OCC is a member, is filing comments on these generic issues. The OCC's comments support, using specific references to evidence developed in the Ohio proceedings, the policy positions set forth in NASUCA's comments.

In the Interim Order that accompanied the NPRM, the Commission also "set forth a comprehensive twelve-month plan ... to stabilize the market."¹³ The Commission adopted a detailed set of interim rules. Those interim rules have already been challenged by some of the Regional Bell Operating Companies ("RBOCs"). The OCC will not comment on this interim scheme.

⁹ See Hagans Affidavit, ¶¶ 38-41.

¹⁰ See Hardie Affidavit, ¶ 53.

¹¹ We refer to the Communications Act of 1934, as amended, *inter alia*, by the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, as the "1996 Act" or "the Act." See generally 47 U.S.C. § 151 *et seq.*

¹² 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), *pets. for cert. filed*, Nos. 04-12, 04-15, 04-18 (June 30, 2004). See also *United States Telecom Ass'n v. FCC*, No. 00-1012, Order, (D.C. Cir. Apr. 13, 2004) (granting a stay of the court's mandate through June 15, 2004) ("*USTA II Stay Order*"). The *USTA II* mandate issued on June 16, 2004.

¹³ FCC 04-179, ¶ 1.

II. THE ISSUES THAT WERE TO BE REVIEWED IN THE STATE PROCEEDINGS

In the *Triennial Review Order*, the Commission set requirements for the state proceedings. First, the state commissions were directed to contradict the Commission's national impairment finding and eliminate unbundling of mass market switching if a geographic market contained at least three non-ILEC competitors providing mass market service using their own switches,¹⁴ or if at least two non-ILEC third parties offered access to their own switches on a wholesale basis.¹⁵ For purposes of this exercise, the Commission gave the states substantial discretion over the definition of the relevant geographic market, consistent with the states' familiarity with local competition.¹⁶ Second, where these competitive "triggers" were not met, the Commission instructed the states to consider whether, despite the many economic and operational entry barriers deemed relevant by the Commission, competitive supply of mass market switching was nevertheless economic.¹⁷ In that event, there would be no impairment and no unbundling of local switching.

In Ohio, the PUCO explicitly afforded the four largest Ohio ILECs the opportunity to challenge the Commission's findings of impairment for mass market switching. Only two of the four saw fit to challenge the Commission's impairment finding. The PUCO found that, for the 38 other ILECs, the Commission finding of impairment for mass market switching would remain in place. None of the 38 other ILECs challenged this combined Commission/PUCO

¹⁴ *Triennial Review Order*, ¶¶ 498-503.

¹⁵ *Id.*, ¶¶ 504-505.

¹⁶ *Id.*, ¶¶ 495-497.

¹⁷ *Id.*, ¶¶ 494, 506-520.

determination at the PUCO. This means that 40 of the 42 Ohio ILECs either had insufficient facilities-based competition for mass market customers in their service territories to meet the triggers, or recognized that facilities-based competition in their territories was uneconomic under any interpretation of the Commission's potential competition test. These companies are listed on Attachment D; clearly, for these companies, the Commission's finding of impairment for ULS should stand.¹⁸ The companies include Verizon, and Sprint, the second and fourth largest ILECs in the state, and three other ILECs serving more than 50,000 access lines each.¹⁹

Further, even for the two companies that challenged the impairment finding, the challenge did not apply to all parts of their territory. CBT challenged the impairment finding in only 3 of the 7 geographic markets designated by the PUCO in its territory,²⁰ while SBC Ohio challenged the impairment finding in only 10 of the 23 geographic markets designated in its territory.²¹ The Commission should, therefore, find that there continues to be impairment in the markets not challenged: 4 of the 7 markets in CBT territory and 13 of the 23 markets in SBC Ohio territory. These markets are listed in Attachment E.

This leaves for consideration the 3 PUCO-specified geographic markets in CBT territory and the 10 geographic markets in SBC Ohio territory as to which the ILECs claimed there was no impairment. It is those geographic markets that these comments focus on, following a discussion of the crucial product market distinction also supported by the Ohio record: the

¹⁸ That impairment finding should hold even for those Ohio ILECs that continue to enjoy the exemption from unbundling allowed by 47 U.S.C. § 251(f).

¹⁹ The remaining companies serve from more than 35,000 access lines to just over 400 access lines.

²⁰ Hardie Affidavit, ¶ 35.

²¹ Hagans Affidavit, ¶ 37.

distinction between the residential and the small business market, which were inappropriately combined into a single “mass market” in the *Triennial Review Order*.

The record shows that some of the geographic markets designated by the PUCO should be broken down further.²² The record also shows that many of the competitive local exchange carriers (“CLECs”) that SBC Ohio used as triggers do not in fact serve mass market customers.²³ And the record shows that in all of those markets there is impairment for service to residential customers.²⁴ For CBT, the record shows that service to mass market customers is uneconomic without unbundling in all the markets that CBT challenged.²⁵ The SBC Ohio- and CBT-challenged markets where there is in fact impairment are listed in Attachment F.

If the Commission erroneously finds no impairment for ULS where there is in fact impairment, then the ubiquitous UNE-P-based competition in SBC Ohio territory will be eliminated, and consumers will be harmed.²⁶ Despite the assertions of the D.C. Circuit in *USTA II*, the Act does not disfavor unbundling.²⁷ The record in the PUCO proceedings was developed at a time when competition for residential customers -- mostly via UNE-P -- was at its height. *USTA II* and subsequent events at the state level have subsequently had the effect of choking off much of that competition. This Commission should not countenance that result.

²² Johnson Affidavit, ¶¶ 80, 95-101.

²³ Id. at ¶¶ 112, 119-123.

²⁴ Hagans Affidavit, ¶ 46.

²⁵ Hardie Affidavit, ¶¶ 11, 56, 57.

²⁶ CBT has no facilities-based mass market competition (id., ¶ 25), and no real competition of any sort for residential customers. Id., ¶ 23. If the Commission finds no impairment for ULS in CBT territory, there will be little, if any, chance for residential competition to develop.

²⁷ See NASUCA Comments.

III. BRIEF COMMENT ON THE STATE OF THE OHIO RECORD

The PUCO conducted 03-2040 in two phases, the second of which was interrupted by *USTA II*. The purpose of the first phase of the proceeding was to define tentatively the geographic markets for SBC Ohio and CBT. During the second phase of the proceeding, the Commission was to determine whether CLECs were impaired without access to the ULS network elements of SBC Ohio and CBT for serving the “mass market,” as provided by the Commission’s *Triennial Review Order*.²⁸ The *Triennial Review Order* requires the Commission to conduct this exercise.²⁹

The PUCO opened the 03-2040 case on October 2, 2003.³⁰ In the October 2 Entry, the PUCO set forth its understanding of its responsibilities under the *Triennial Review Order*, including defining the geographic markets and determining whether there was impairment in those markets. The PUCO concluded that it would make a tentative finding on the markets first, and then measure impairment in a second phase of the proceeding.

The PUCO determined to begin its proceeding with the four largest Ohio ILECs: SBC Ohio, Verizon, Sprint and CBT.³¹ The PUCO required any of these ILECs that challenged the Commission’s finding of impairment for mass market switching to file a petition no later than

²⁸ *Triennial Review Order*, ¶¶ 459.

²⁹ *Id.*, ¶¶ 493-520.

³⁰ PUCO Case 03-2040, Entry (October 2, 2003) (“October 2 Entry”) at 3; see <http://dis.puc.state.oh.us/dis.nsf/0/936823E5C82E834E85256DB3006086E5?OpenDocument>.

³¹ *Id.* at 3-4.

October 17, 2003.³² Only SBC Ohio and CBT filed such petitions.³³ Intervention was granted to a number of CLECs and the OCC.³⁴

As to the Ohio ILECs other than the four largest, the PUCO determined that the Commission's impairment finding would continue to apply. None of these ILECs applied for rehearing from the PUCO's finding.

A hearing was set to begin December 9, 2003 on determining the markets. Pursuant to the Ohio procedural rules, numerous pieces of testimony were prefiled. The hearing ran December 9-11, 2004. Briefs and reply briefs were filed.

On January 14, 2004, the PUCO issued an Opinion and Order establishing a tentative definition of markets.³⁵ The PUCO determined that the Ohio geographic markets in which impairment would be assessed were contiguous clusters of SBC Ohio and CBT wire centers segregated by UNE loop rates. There were 23 markets within the five Metropolitan Statistical Areas ("MSAs") where SBC Ohio had chosen to challenge the Commission's impairment finding, and 8 markets within CBT's service territory. CBT later notified the PUCO that it would challenge the impairment finding in only 4 of its markets.

The PUCO thereafter bifurcated the proceedings into the SBC Ohio case and the CBT case. In the CBT case, CBT prefiled its expert testimony on February 3, 2004; intervenors,

³² Id. at 4.

³³ PUCO Case 03-2040, Entry (October 28, 2003) ("October 28 Entry") at 3; see [http://dis.puc.state.oh.us/cgi-bin/CMWebCGI.exe?ItemID=AGT\\$LOV\\$F1I3L1C+Id](http://dis.puc.state.oh.us/cgi-bin/CMWebCGI.exe?ItemID=AGTLOVF1I3L1C+Id).

³⁴ Id.

³⁵ See footnote 6, *supra*.

including the OCC, prefiled expert testimony on February 23, 2004;³⁶ and hearing was scheduled for March 29, 2004. In the SBC Ohio case, SBC Ohio filed its expert testimony on February 10, 2004. Intervenors were scheduled to file expert testimony on March 9, 2004 and a hearing was scheduled for March 29, 2003.

Then *USTA II* hit; the decision was announced on March 2, 2004. On March 3, 2004, by Entry, both the SBC Ohio and CBT cases were held in abeyance.

The records in the cases when interrupted then included sworn testimony and cross-examination (focused on the definition of the geographic markets). In 04-34 (the SBC Ohio case), the record consisted of prefiled direct testimony from SBC Ohio,³⁷ deposition transcripts and voluminous discovery. Intervenors were in the process of drafting testimony when the case was stayed. In 04-35 (the CBT case) testimony had been prefiled by CBT and by intervenors; there were also deposition transcripts and discovery.

Those are the items in the Ohio record. **The OCC submits that this record is sufficient for the Commission to find that, for residential customers, there is impairment for ULS throughout the SBC Ohio and CBT territories.**³⁸ This impairment is shown by the attached affidavits.

This information is presented to the Commission in this form because of the way the Ohio record was developed, and because of the limitations of the SBC Ohio and CBT proceedings that came to an end before any final findings were made. In the NPRM, the

³⁶ Including the testimony of Karen Hardie.

³⁷ In Ohio, expert testimony is prefiled but is not formally in the record until a motion to admit is granted at hearing, typically following cross-examination by other parties.

³⁸ Based on principles set forth in the NASUCA comments.

Commission asked for assistance from the states, as follows: “To avoid duplicative filings, we encourage parties (particularly the state commissions and parties participating in the state proceedings) to coordinate with one another regarding the filing of that information.”³⁹ Other than its tentative definition of geographic markets, the PUCO was not able to conclude any of the proceedings before the *USTA II* invalidation of the Commission’s rules halted the proceedings.

Further, the PUCO has not, to date, issued a request or order to coordinate these comments. The diversity of views about the correct interpretation of the record -- especially the disputes between the OCC and SBC Ohio and the OCC and CBT -- also make the coordination of effort infeasible, especially given the constrained time frame of this proceeding, which makes it difficult for even an individual presentation of the record, much less a coordinated one.

The Commission also directed that parties generally not incorporate merely by reference entire documents or significant portions of documents that were filed in the state proceedings.⁴⁰ The OCC has attempted to comply with this request by filing new affidavits that specifically include the information that was contained in the Ohio record. The OCC has attempted to “provide a complete recitation in [this] filing[] of any arguments or data that they wish the Commission to consider,” including “the underlying data, analysis and methodologies necessary to enable the Commission to evaluate the factual claims meaningfully...”⁴¹

³⁹ NPRM, ¶ 15.

⁴⁰ Id.

⁴¹ Id.

IV. THE COMMISSION SHOULD VIEW RESIDENTIAL SERVICE AND SMALL BUSINESS SERVICE AS SEPARATE PRODUCT MARKETS.

The Commission should rule that the residential product market is separate from the small business product market. Although the Commission initially combined these two customer classes into the mass market, a properly granular analysis should review impairment for each product due to the substantial differences between residential service and business service -- even small business -- service.

In discussing ULS, the Commission asked the states to look at the product dimension based on two markets: ULS used to serve the mass market and ULS used to serve the enterprise market.⁴² Yet earlier in the *Triennial Review Order*, the Commission distinguished “three classes of customers -- mass market, small and medium enterprise, and large enterprise....”⁴³

The Commission stated that:

[t]hese classes can differ significantly based on the services purchased, the costs of providing service, and the revenues generated. Because of these differences, for certain network elements the determination whether impairment exists may differ depending on the customer class a competing carrier seeks to serve.⁴⁴

For the purpose of establishing whether competitors are impaired without access to ULS, the mass market should be subdivided into the residential and business markets.⁴⁵ The residential/small business market split illustrates a basic fact that even ILEC witnesses acknowledged in the Ohio proceedings: these markets vary in precisely the terms the FCC used

⁴² *Triennial Review Order*, ¶¶ 421-422. The enterprise market was defined as customers using more than three access lines.

⁴³ *Id.*, ¶ 124 (emphasis added).

⁴⁴ *Id.*

⁴⁵ Johnson Affidavit, ¶ 23-35.

to separate product markets.⁴⁶ The CBT witness acknowledged as an axiomatic certainty that residential customers do not have a choice of providers where carriers are serving only the small business portion of the mass market.⁴⁷

Nothing in the *Triennial Review Order* or *USTA II* forbids a finding separating the residential and small business markets by this Commission or the PUCO.⁴⁸ Dr. Johnson explained the various features of the *Triennial Review Order* that allow such a differentiation.⁴⁹ Indeed, the residential/business differential is precisely the sort of “variation in factors affecting competitors’ ability to serve each group of customers” that the FCC directed the state commissions to consider.⁵⁰ In the Ohio proceedings, MCI witness Murray stated,

[T]he Commission [PUCO] should allow the empirical evidence to dictate its view of whether residential and business customers are in the same market.... If a carrier serves small business customers but not residential customers using its own switch, that very fact implies that there is a meaningful difference between small business and residential customers.⁵¹

As a practical matter, such a distinction is vital to the continued existence and further growth of a competitive market for residential customers. The existence of competition for small business customers has virtually no impact on the choices available to residential customers, if the CLECs providing small business service do not also offer competitive options for residential

⁴⁶ See PUCO Case 03-2040, Tr. II (Murray) at 44-45, 85.

⁴⁷ PUCO Case 03-2040, Tr. I (Maggard) at 39-41.

⁴⁸ See, e.g., *Triennial Review Order*, ¶ 496. Indeed, *USTA II*’s discussion of the supposed “subsidies” flowing from business customers to residential customers supports examining the two classes separately. *USTA II*, 359 F.3d at 573.

⁴⁹ Johnson Affidavit, ¶ 32; see also PUCO Case 03-2040, Tr. II (Murray) at 44-46.

⁵⁰ *Triennial Review Order*, ¶ 495.

⁵¹ PUCO Case 03-2040, MCI Ex. 1 (Murray) at 41-42; see also PUCO Case 03-2040, Tr. II (Murray) at 37.

customers. In the Ohio proceeding, Allegiance witness Strickling stated, “[T]here are companies such as ours that serve the small business market which in the FCC parlance would be a mass market customer, and we do not serve the residential customer.”⁵² A finding of no impairment for residential customers based on competition for small business customers defies logic and contradicts the intent of the 1996 Act.

The Commission should recognize and preserve the residential/small business differential so that the different competitive conditions faced by residential and business customers will not be lost. Among the factors distinguishing between residence and business service are retail rates, usage charges and competitive margins.

A. Retail rates

The differences in retail rates between residential service and business service in Ohio are significant.⁵³

	SBC Ohio ⁵⁴	CBT ⁵⁵
Residential rate	\$6.70	Rate Band 1: \$16.75 Rate Band 2: \$17.95 Rate Band 3: \$18.95
Business rate	Access area B: \$15.95 Access area C: \$17.95 Access area D: \$20.45	Rate Band 1: \$46.25 Rate Band 2: \$48.00 Rate Band 3: \$49.75

SBC Ohio’s business access-only rate is 2.4 to 3.0 times greater than the residential access-only

⁵² PUCO Case 03-2040, Tr. III (Strickling) at 158.

⁵³ Hagans Affidavit ¶¶ 21, 25.

⁵⁴ SBC Ohio rates are for the network access line, which includes central office termination. No usage charges for SBC Ohio are included in this chart. Id., ¶¶ 16.

⁵⁵ CBT rates are for flat rate service. Id., ¶¶ 23.

rate. CBT's business flat rate rate is 2.6 to 2.8 times greater than the residential flat rate. Notably, although SBC Ohio and CBT both have residential and business tariffs, neither company has a "mass market" tariff.⁵⁶

B. Usage charges

A second fundamental difference between small business and residential services for SBC Ohio is usage charges. Although a "substantial majority" of SBC Ohio residential customers use a flat rate option,⁵⁷ SBC Ohio's business customers have only measured and message rate options.⁵⁸ This further differentiates SBC Ohio's residential local service and business local service products.

C. Competitive margins

Wholesale rates -- which are uniform across customer classes -- produce different margins for serving small business and residential customers, given the different retail rates. CBT's situation provides an example of the different margins provided by residential service and business service, through a simple comparison to UNE loop rates:

⁵⁶ SBC Ohio: PUCO Case 03-2040, Tr. I (Deere) at 118; CBT: PUCO Case 03-2040, Tr. I (Maggard) at 31-32.

⁵⁷ Hagans Affidavit, ¶ 17.

⁵⁸ Id., ¶ 19.

	Residential rate	Business rate
Retail rate ⁵⁹	Rate Band 1: \$16.75 Rate Band 2: \$17.95 Rate Band 3: \$18.95	Rate Band 1: \$46.25 Rate Band 2: \$48.00 Rate Band 3: \$49.75
UNE loop rate ⁶⁰	Rate Band 1: \$10.59 Rate Band 2: \$13.47 Rate Band 3: \$15.43	Rate Band 1: \$10.59 Rate Band 2: \$13.47 Rate Band 3: \$15.43
Gross margin available to CLECs	Rate Band 1: 58% Rate Band 2: 33% Rate Band 3: 23%	Rate Band 1: 330% Rate Band 2: 256% Rate Band 3: 222%

These figures show that the economics of serving these two customer classes are significantly different. CLECs recognize these differences and as a result have chosen to enter the small business market while staying out of the residential markets. As long as the competitive service providers recognize the separate markets, the Commission should also.

D. The problem with treating residential customers and small business customers as part of the same market

If the Commission treats residential and small business customers as part of the same market, and there is no finding of impairment for ULS in that market based on service to small business customers, then residential customers will be denied the benefits of UNE-P competition despite the fact that there is impairment for service to residential customers without access to ULS. In Ohio, both SBC Ohio's and CBT's situations illustrate this dilemma.

In the SBC Ohio territory, more than 90% of the competition for residential consumers is achieved via UNE-P.⁶¹ If there is a finding of no impairment for mass market ULS in SBC Ohio

⁵⁹ Johnson Affidavit, ¶¶ 23-24.

⁶⁰ PUCO Case 03-2040, CBT Ex. 1 (Maggard) at 8.

⁶¹ PUCO Case 03-2040, AT&T/CoreComm Ex. 1 (Gillan) at 10.

territory, this UNE-P competition will disappear. On the other hand, there is virtually no UNE-based residential competition in CBT's territory.⁶² The facilities-based mass market competition in CBT's territory, upon which CBT proposed a finding of no impairment in the Ohio proceeding, is for small business customers only.⁶³ A finding of no impairment based on this service to small business will prevent there ever being UNE-based service to residential customers.

Dr. Johnson's ultimate recommendation to the PUCO on product markets was as follows:

I would recommend that you err in the direction of in each geographic area split it between small business and residential.... [T]here is nothing that will prevent from concluding that the same lack of impairment exists for both the business market and the residential market say in downtown Cleveland. You could reach that conclusion later, but to first say we are going to assume that business and residents are sufficiently different we need to have the data separate for each ...

In doing that you may, for example, quickly discover that there is so little residential activity going on that even in the upper income parts of the city there is clearly impairment still present and there is no reason to believe that people can afford to serve residential customers regardless of neighborhood, but you are going to be able to pick up those patterns much more clearly if you initially declare that we are going to look at the data separately for business and residents.⁶⁴

The Commission should adopt that recommendation here.

As Dr. Johnson stated in the Ohio proceeding, "I don't think there was ever an intent to put the commissions into a straight jacket and force them into a Hobson's choice where they are

⁶² PUCO Case 03-2040, PUCO Case 03-2040, Tr. I (Maggard) at 39. At base, there is no real residential competition of any sort in CBT territory.

⁶³ Id. at 39-40. As just shown, the margins available for service to small business customers in CBT territory are substantially greater than those available for service to residential customers.

⁶⁴ PUCO Case 03-2040, Tr. III (Johnson) at 57-58. Dr. Johnson was able to answer detailed questions about how the differentiation of residence customers and business customers would take place. See id. at 59-71.

either declaring a lack of impairment where impairment exists or impairment where a lack of impairment exists.”⁶⁵ Forcing residential and business customers into the same market, when there are so many differences between them, would definitely create such a risk.

The Commission should recognize that if an ILEC attempted to charge supra-competitive prices for residential service, residential customers would not be able or willing switch to small business service. And if the ILEC attempted to charge supra-competitive prices for small business services, the small customers would be unable to switch to residential service. Thus the products within the so-called “mass market” are not substitutes for each other.

As a practical matter, a distinction between residential and small business customers is vital to the continued existence and further growth of a competitive market for residential customers. The existence of competition for small business customers has virtually no impact on the choices available to residential customers if the CLECs providing small business service do not also offer competitive options for residential customers.⁶⁶ If the Commission treats residential and small business customers as part of the same market and then finds no impairment in that market based on service to small business customers, then residential customers will be denied the benefits of UNE-P competition despite the fact that there is impairment for service to residential customers without access to ULS. The Commission should not ignore a vital factor in the analysis of the competitive market in light of the record in this case that demonstrates the significant differences between residential service and small business service.

⁶⁵ Id. at 65-66.

⁶⁶ See PUCO Case 03-2040, Tr. III (Strickling) at 158.

V. THE COMMISSION SHOULD ADOPT GEOGRAPHIC MARKETS THAT REPRESENT CLUSTERS OF WIRE CENTERS WITH HOMOGENEOUS CHARACTERISTICS.

A. The Commission's guidance

The Commission established parameters for defining the relevant geographic market on a granular basis: First, a state commission must use the same market definition for the “trigger” analysis and the economic impairment analysis. Second, a state commission may not define the market to encompass the entire state. Third, a commission should not define the market so narrowly “that a competitor serving that market alone would not be able to take advantage of available scale and scope economies from serving a wider market.”⁶⁷ Finally, the Commission “should attempt to distinguish among markets where different findings of impairment are likely.”⁶⁸

According to the Commission, when defining the market, the following must be considered:

- The locations of customers actually being served (if any) by competitors
- The variation in factors affecting competitors' ability to serve each group of customers
- Competitors' ability to target and serve specific markets economically and efficiently using currently available technologies
- How competitors' ability to use self-provisioned switches or switches provided by a third-party wholesaler to serve various groups of customers varies

⁶⁷ *Triennial Review Order*, ¶ 495.

⁶⁸ *Id.*

geographically.⁶⁹

The Commission also gave specific examples of additional factors that can be considered in defining the relevant market:

- How UNE loop rates vary across the state
- How retail rates vary geographically
- How the number of high-revenue customers varies geographically
- How the cost of serving customers varies according to the size of the wire center and the location of the wire center
- Variations in the capabilities of wire centers to provide adequate collocation space and handle large numbers of hot cuts.⁷⁰

The Commission did not ignore the fact that states have, in fact, made determinations on markets: The Commission recognized that state commissions may have previously established geographic markets for other purposes, such as retail ratemaking, the establishment of UNE loop rate zones, and the development of intrastate universal service mechanisms. The PUCO's previous use of access areas as geographic markets for purposes of setting UNE loop rates is an example of a previously established geographic market definition that this Commission recognizes.⁷¹ The Commission indicated that a state commission may use these existing geographic areas to define the market if, after considering the above factors, it determines they would be appropriate.⁷²

⁶⁹ Id.

⁷⁰ Id., ¶ 496.

⁷¹ PUCO Case 03-2040, Opinion and Order (January 13, 2004) at 26.

⁷² *Triennial Review Order*, ¶ 496.

B. The OCC's proposal and others' proposals

The OCC recommended to the PUCO and also recommends to this Commission, that a “bottom up” or “start small and build out” approach should be taken for establishing the proper markets for judging impairment, as explained in detail in the Johnson Affidavit.⁷³ This process establishes geographic markets composed of clusters of wire centers with homogeneous characteristics.⁷⁴ The clusters should generally be composed of contiguous wire centers that share key characteristics important for local exchange service, such as costs and customer density.

Such clusters of wire centers would allow CLECs to enjoy economies of scale and scope, as required by the FCC,⁷⁵ but do not categorically exceed the notion of a unified market. This approach will allow the Commission to limit its findings of no impairment to those areas where there is truly no impairment, without erroneously affecting areas where there is impairment. Similar proposals were advanced by other parties in 03-2040.⁷⁶

The other proposals set forth in 03-2040 -- by SBC Ohio, CBT and AT&T/CoreComm -- were faulty and should be rejected by this Commission, as they were by the PUCO.⁷⁷ SBC Ohio proposed that the PUCO use MSAs, determined by the federal Office of Management and

⁷³ Johnson Affidavit, ¶¶ 10-16.

⁷⁴ Id., ¶ 22.

⁷⁵ *Triennial Review Order*, ¶ 495.

⁷⁶ PUCO Case 03-2040, Opinion and Order (January 13, 2004) at 25. Even SBC Ohio's witness Dr. Tardiff acknowledged that if SBC Ohio's proposal were rejected, the fallback would be clusters of wire centers. PUCO Case 03-2040, Tr. II (Tardiff) at 102.

⁷⁷ PUCO Case 03-2040 Opinion and Order (January 13, 2004) at 27, 31-32.

Budget ("OMB"), as the market over which impairment should be measured.⁷⁸ More precisely, SBC Ohio's proposal was to use the SBC Ohio *portion* of MSAs as the market.⁷⁹

MSAs -- even the portions of the MSAs served by SBC Ohio -- do not constitute appropriate markets over which impairment can be measured. SBC Ohio itself does not treat entire MSAs as single markets, as shown by SBC Ohio's advertisements and local calling areas.⁸⁰ Conditions within the MSAs are far too diverse to make the MSA a single market for judging impairment.⁸¹ Further, CLEC advertising and entry patterns do not show that the service is available to or offered to the mass market, much less the residential market.⁸² And finally, advertising that is based on the widespread availability of the UNE-P has little in common with advertising that is based on the entry of CLECs providing their own switches, which is the issue in an impairment proceeding.⁸³

CBT proposed three separate markets within its territory, based on conglomerations of wire centers.⁸⁴ The principle behind CBT's proposal -- grouping wire centers -- is reasonable. The Commission cannot, however, accept CBT's three proposed markets, based as they are merely on CBT's assertions of lack of impairment rather than any common characteristics of the area.

⁷⁸ Johnson Affidavit, ¶ 36, 49.

⁷⁹ PUCO Case 03-2040, Tr. I (Deere) at 80.

⁸⁰ PUCO Case 03-2040, Tr. II (Tardiff) at 127-128; Hagans Affidavit, ¶¶ 7-15 and Attachment KLH-1.

⁸¹ Johnson Affidavit, ¶¶ 51-53.

⁸² Id., ¶¶ 36-48.

⁸³ See PUCO Case 03-2040, MCI Ex. 1 (Murray) at 58.

⁸⁴ Hardie Affidavit, ¶ 11.

AT&T and CoreComm's joint witness proposed that the respective incumbents' entire service territories be used to define the markets.⁸⁵ As a fallback, the witness proposed to use local access and transport areas ("LATAs").⁸⁶ Both proposals must be rejected. By no stretch of the imagination can all parts of the SBC Ohio territory -- located in non-contiguous portions of northwest, northeast, central, southwest and southeast Ohio, be viewed as a single market. The absence of common characteristics that makes individual MSAs inappropriate for use as a geographic market is exacerbated when viewing the entire SBC Ohio territory or even LATAs within that territory.⁸⁷

Defining the non-contiguous metropolitan areas in Ohio served by SBC Ohio -- in the northwest, northeast, center and southwest of the state⁸⁸ -- as a single market disregards much of the FCC's direction in the *Triennial Review Order*.⁸⁹ Even more so, combining the metropolitan areas with the SBC Ohio rural territory scattered throughout the state, with their significantly different cost structures, strains all credulity. AT&T's approach would include downtown Cleveland and South Solon in the same market.⁹⁰ South Solon is located 43 miles southwest of Columbus, and 185 miles south of downtown Cleveland. Intuitively, these wire centers are not in the same market.⁹¹

⁸⁵ PUCO Case 03-2040, AT&T/CoreComm Ex. 1 (Gillan) at 10.

⁸⁶ *Id.* at 14.

⁸⁷ See Johnson Affidavit, Map 1.

⁸⁸ *Id.*

⁸⁹ *Triennial Review Order*, ¶ 495.

⁹⁰ PUCO Case 03-2040, Tr. I at 184.

⁹¹ The same problem occurs with the LATAs. Columbus, Ironton and Marietta are all in the Columbus LATA;

As Dr. Johnson states,

If a state is divided into just a handful of broad markets, each containing widely varying market conditions, grave difficulties are encountered in performing a granular analysis. If large geographic areas are treated as a single market, the risk is that these broad markets will yield conclusions concerning impairment that are only valid for some customers (e.g., those in downtown Cleveland) and are not valid for other customers (e.g., those in adjacent suburbs).

Broad areas such as Metropolitan Statistical Areas (MSAs) and Component Economic Areas (CEAs) contain urban, suburban and rural components. Consequently, there are often extreme differences in operating and engineering characteristics between specific wire centers within each area. In turn, these differences translate into substantial differences in the cost of using a CLEC switch to serve mass market customers in different wire centers within a single area. For example, the number of enterprise customers may differ; similarly, different UNE loop rates may apply to urban and rural wire centers within an area. For this and other reasons there may be substantial differences in the effective cost per line of serving customers using a CLEC switch (e.g., due to differences in available economies of scale with respect to inter-office transport facilities and collocation facilities).⁹²

The definition of geographic markets that the OCC proposes yields a result that fully meets the Commission's directives. All of the larger alternatives -- statewide ILEC territory, LATAs, or MSAs -- run the risk of eliminating ULS where there is no competition. As Dr. Johnson describes,

Due to the extreme heterogeneity within LATAs, MSAs and CEAs, these are not sufficiently granular for purposes of identifying where impairment exists. By looking at aggregate data for these broad geographic markets, one might conclude that impairment exists (or doesn't exist), without realizing that impairment is a problem in part of the area, and not a problem in another part of the area. This lack of granularity is analogous to the story about the river that is 18 inches deep on average; the problem is that the river actually ranges from one inch deep to 30 feet deep. Looking at the aggregate (average) data, one cannot tell whether it is feasible to wade the river. Similarly, the mix of high revenue customers and low revenue customers may differ throughout a broad geographic area like a LATA, MSA or CEA. Hence, CLECs may confront entirely different conditions in

Ripley and Piqua are in the Dayton LATA; and Lima and Mansfield (not SBC Ohio exchanges) are in the *noncontiguous* Mansfield/Lima LATA. Identifying each of these as unified markets has no basis in reality.

⁹² Johnson Affidavit, ¶¶ 19-20.

considering the potential for using their own switch to serve mass market customers in different parts of the overall area. To overcome this difficulty, I believe it is preferable to define the relevant markets on the basis of individual wire centers having homogeneous characteristics.⁹³

Using a large geographic definition of the market runs this risk of averaging, because there are certainly “low spots” in SBC Ohio and CBT territories where residential customers have no facilities-based competitive choice. The OCC’s proposed market designation minimizes that risk.

C. Details of the OCC’s proposal

The OCC proposes that the Commission define markets in Ohio as clusters of wire centers.⁹⁴ A number of other parties in 03-2040 in 03-2040 agreed on this general approach.⁹⁵ SBC Ohio witness Dr. Tardiff noted that this clustering approach is fundamental to antitrust policy.⁹⁶

The clusters would reflect similarities in:

- the mix of business and residential customers;
- UNE loop rates;
- facilities-based CLEC entry patterns;
- line density;
- total lines in the wire center; and

⁹³ Id., ¶ 21. MCI witness Murray used a different -- but equally vivid -- analogy, comparing dissimilar exchanges to “a bucket of ice water and a bucket of boiling water, which, on average, are a comfortable temperature.” PUCO Case 03-2040, MCI Ex. 1 (Murray) at 33-34.

⁹⁴ Johnson Affidavit, ¶ 22.

⁹⁵ PUCO Case 03-2040, Tr. I (CBT witness Maggard) at 23; PUCO Case 03-2040, MCI Ex. 1 (Murray) at 3-4 (“Use of the wire center as the basic building block for analysis accomplishes the FCC’s goals of a granular analysis that maximizes accuracy of results, subject to the constraints of practicality.”), 17-18, 55, see also PUCO Case 03-2040, Tr. I (Murray) at 259, PUCO Case 03-2040, Tr. II (Murray) at 23-24; PUCO Case 03-2040, Allegiance Ex. 1 (Strickling) at 8, PUCO Case 03-2040, Tr. III (Strickling) at 153; PUCO Case 03-2040, Sage/Talk America Ex. 1 (Kelley) at 11; PUCO Case 03-2040, Tr. II (Kelley) at 260-261, PUCO Case 03-2040 288; Tr. II (Binder) at 178.

⁹⁶ PUCO Case 03-2040, SBC Ohio Ex. 4 (Tardiff) at 3.

- residential revenues per customer.

By starting small and building up wire centers into clusters, the markets will most likely be contiguous.⁹⁷

Another factor that should be considered is local calling areas. As Dr. Johnson states, local calling areas should be viewed as the upper limit of a reasonable cluster.⁹⁸ Ms. Hagans' affidavit shows that there are numerous exchanges within SBC Ohio's chosen markets that are a toll call to the center exchange of the MSA.⁹⁹ If there is an insufficient community of interest between two exchanges to justify local calling,¹⁰⁰ the two exchanges can hardly be thought of as being in the same market.

The "bottom up," or "start small and build up" approach will best serve the public interest. The Commission should adopt such an approach.

D. MSAs cannot be used to define markets in Ohio.

SBC Ohio proposed using MSAs as the geographic market for determining impairment. The inappropriateness of MSAs as a geographic market is graphically shown in the maps attached to the Johnson Affidavit. For example, Maps 4 through 10 attached to the Johnson Affidavit show the SBC Ohio wire centers served, respectively, by the seven CLECs that have switches in the Columbus MSA.¹⁰¹ The maps show that the CLECs serve as few as four and as

⁹⁷ Indeed, it is counterintuitive to think of non-contiguous wire centers, exchanges, or other units as part of the same market.

⁹⁸ Johnson Affidavit, ¶ 75.

⁹⁹ Hagans Affidavit, ¶ 11 and Attachment KLH-1.

¹⁰⁰ See *id.* at 14.

¹⁰¹ As noted elsewhere, these switches do not serve residential customers.

many as 22 of the wire centers in the Columbus MSA.¹⁰² No CLEC serves every wire center in the Columbus MSA. The CLECs are concentrated in particular areas in response to heterogeneous characteristics within the MSA.¹⁰³

As Dr. Johnson noted,

As explained earlier, defining an MSA or other broad geographic area as the geographic market could result in inappropriate, illogical, or misleading conclusions regarding impairment. The maps showed CLEC entry is disproportionately concentrated in the more urbanized portions of the MSA. There is no basis for assuming that entry patterns that have occurred in a downtown area or business district can be replicated in a suburban or rural area. This is particularly true if the difference between business and residential customers is ignored. Market conditions in the downtown area (e.g., number of enterprise customers) may be atypical, and thus entry may not easily be replicated in the residential market, or in other parts of the overall MSA.¹⁰⁴

The danger in analyzing impairment using MSAs or broader geographic areas instead of the more granular wire center analysis is that the Commission runs the risk of being overly inclusive in grouping wire centers in the impairment analysis. Wire centers that have no CLECs serving mass market customers with their own switches -- much less serving residential customers -- must not be grouped with those wire centers where such CLECs exist.

The record in 03-2040 clearly showed that, in Ohio at least, MSAs are inappropriate as geographic markets for impairment purposes. For example, MSAs have little correlation to ILECs' service territories or local calling areas, which generally reflect a community of interest.¹⁰⁵ As the Hagans Affidavit notes, only 56 of the 78 SBC Ohio central offices in the six

¹⁰² Johnson Affidavit, Maps 4-10.

¹⁰³ See *id.* at ¶ 54.

¹⁰⁴ *Id.*, ¶¶ 65-66.

¹⁰⁵ See Hagans Affidavit, ¶ 13-15.

MSAs she examined have flat rate local calling to the MSA's metro exchange.¹⁰⁶ The other 22 exchanges have either measured rate calling or no local calling to the metro exchange.¹⁰⁷

In establishing MSA boundaries, the OMB does not look at the same criteria that this Commission enumerated in the *Triennial Review Order*. The OMB establishes MSA boundaries using criteria that are at best tangentially related to the factors required by the Commission.¹⁰⁸ The OMB does not analyze where CLECs use their own switches to serve mass market customers or the economics involved in such operations. Nor does the OMB include an analysis of CLEC patterns of entry into ILEC service territories as part of the determination of MSAs.

SBC Ohio's data does not support the notion that CLECs attempt to serve mass market customers on an MSA-wide basis. SBC Ohio witness Deere's Attachment WCD-3 showed that each MSA has numerous wire centers in which no CLECs have obtained "mass market" UNE loops from SBC Ohio.¹⁰⁹ The evidence showed that no CLECs had obtained "mass market" UNE loops from SBC Ohio in nine of the 19 central offices in the Akron MSA, nine of the 40 central offices in the Cleveland-Elyria-Mentor MSA, eleven of the 30 central offices in the Columbus MSA, eight of the 20 central offices in the Dayton MSA and four of the 12 central offices in the Toledo MSA.¹¹⁰ Although alleging that CLECs *could* be using their own loops to serve "mass market" customers in these central offices, Mr. Deere did not represent that CLECs

¹⁰⁶ Id. at ¶ 11.

¹⁰⁷ Id.

¹⁰⁸ See, e.g., PUCO Case 03-2040, Tr. I (Deere) at 75, 79-80, 85.

¹⁰⁹ Id. at 109-112.

¹¹⁰ See PUCO Case 03-2040, SBC Ohio Ex. 1 (Deere), Attachment WCD-3.

actually were serving any “mass market” customers in these central offices.¹¹¹

E. CBT’s geographic market approach must also be rejected.

CBT proposed a market definition that failed to comply with the basic requirements set forth in the *Triennial Review Order*.¹¹² Specifically, CBT’s proposed market definition simply grouped together wire centers having, as CBT claims, a certain number of CLEC switches serving mass market customers.¹¹³ CBT’s proposal lacks any analysis of how the grouped exchanges constitute a market and fails to follow any methodology that the Commission could adopt in defining other Ohio markets.¹¹⁴

In developing its geographic proposal, CBT segregated its central offices into three market areas based on the presence of CLEC switches, UNE loop rate bands (bands one, two and three), and number portability requests submitted by CLECs between August 1, 2000 and September 30, 2003. CBT determined that its territory consisted of the following three markets: Market 1, comprised of the 28 central offices located in UNE loop rate bands 1 and 2 that had -- according to CBT -- at least three CLEC switches serving mass market customers; Market 2, comprised of 6 central offices located in UNE loop rate bands 1 and 2 that did not have at least three CLEC switches serving mass market customers; and Market 3, comprised of all 7 of the central offices in UNE rate band 3.¹¹⁵ CBT witness Maggard acknowledged that the only factor differentiating the wire centers in Market One from Market Two was the presence of CLEC

¹¹¹ PUCO Case 03-2040, Tr. I at 112-113.

¹¹² *Triennial Review Order*, ¶495.

¹¹³ Hardie Affidavit, ¶ 13.

¹¹⁴ Johnson Affidavit, ¶¶ 67-69.

¹¹⁵ Hardie Affidavit, ¶ 13.

switches allegedly serving mass market customers.¹¹⁶

CBT later significantly altered the composition of its geographic market proposal from its original position. CBT filed amended direct testimony reducing by 14 the central offices in Market 1 and moving those central offices into Market 2.¹¹⁷ In certain instances CBT also reduced the number of CLEC switches serving mass market customers in the central offices.¹¹⁸ Although CBT's amended direct testimony changed the central offices in Markets 1 and 2, it did not cure the lack of analysis in the initial filing. The only thing that changed was totaling manually, rather than mechanically, CLEC ported number requests.¹¹⁹

F. The PUCO's tentative market definition

After a careful review of the record, the PUCO issued an Opinion and Order on January 14, 2004 which tentatively resolved the geographic market definition debate for purposes of the Ohio impairment proceedings. The PUCO found that

the appropriate geographic markets to be used for the purpose of assessing whether a CLEC is impaired in serving mass market customers in the absence of access to unbundled local switching shall tentatively be established in the following manner:

(1) The service area of an ILEC within each of the MSAs at issue in this proceeding (Akron, Cincinnati, Cleveland-Elyria-Mentor, Columbus, Dayton, and Toledo) shall be divided into separate areas according to the Commission-established UNE-loop TELRIC rates (Access Areas B, C, and D for SBC Ohio or Rate Bands 1, 2, and 3 for Cincinnati Bell).

(2) Each resulting area established above shall be further subdivided into

¹¹⁶ PUCO Case 03-2040, Tr. I (Maggard) at 34.

¹¹⁷ Hardie Affidavit, ¶ 14.

¹¹⁸ Id.

¹¹⁹ Id.

clusters of contiguous wire centers within each applicable UNE-loop TELRIC rate zone.¹²⁰

The Commission summarized its rationale as follows:

The first criterion ensures that the wire centers within a particular area have similar loop densities and identical wholesale loop rates. The second criterion ensures that the wire centers that have similar loop densities and identical loop rates are also geographically contiguous.¹²¹

The PUCO determined that this market definition was “consistent with the *Triennial Review Order*.”¹²² Maps depicting the PUCO’s markets for SBC Ohio are attached to the Hagans Affidavit.

G. The OCC’s refinements to the PUCO’s tentative market definition

Dr. Johnson states:

In general, I strongly agree with the Ohio Commission’s policy decision to define markets as small clusters of wire centers with homogenous characteristics. Moreover, I believe the specific markets adopted by the Ohio Commission generally comport well with this policy decision.¹²³

Yet further discovery and research showed that there were some problems with the PUCO’s tentative conclusions. As Dr. Johnson states, “[I]n some cases the lack of homogeneity is significant, because it reduces the likelihood that conclusions drawn with respect to a lack of impairment based upon existing CLEC activity in one part of the market will also be valid with respect to other parts of the market.”¹²⁴

¹²⁰ PUCO Case 03-2040, Opinion and Order (January 13, 2004) at 24.

¹²¹ Id.

¹²² Id.

¹²³ Johnson Affidavit, ¶ 79.

¹²⁴ Id., ¶ 79.

Dr. Johnson developed a “homogeneity index which reflects the degree to which wire centers are significantly different from a central wire center within each major market area.”¹²⁵ The process and rationale for the homogeneity index are set forth in detail in Dr. Johnson’s affidavit.¹²⁶ The homogeneity index takes into account, in addition to the factors relied on by the PUCO, “the total number of lines; the ratio of enterprise lines to total lines, the number of lines per square mile (density), and the number of carriers collocated at the wire center (although not necessarily serving mass market customers through that collocation facility).”¹²⁷ Dr. Johnson then combined these rankings by giving them equal weight in the form of an index value.”¹²⁸ These index values were then used, in conjunction with information concerning airline distances, UNE rate zones, and other factors, to identify contiguous groups of wire centers with reasonably homogeneous characteristics.¹²⁹

Dr. Johnson’s analysis showed major heterogeneity issues in only two of the PUCO-defined markets in which SBC Ohio was challenging the Commission’s impairment finding. Those markets, and the reasons why those markets should be subdivided, are also set forth in

¹²⁵ Id., ¶ 81.

¹²⁶ Id., ¶¶ 82-93.

¹²⁷ Id., ¶ 81.

¹²⁸ Id.

¹²⁹ Id., ¶ 82. Dr. Johnson states, “In this context, my goal was to sort wire centers on the basis of the degree to which they share characteristics that are similar to each other; I accomplished this by comparing all of the wire centers to a common benchmark or “index” based upon the initially selected wire center. A wire center that was slightly more dense, or slightly less dense, (regardless of the direction of the difference) was one step removed from the initially selected wire center. Other wire centers (with even more disparate density) were logically ranked farther away from the initially selected wire center.” Id., ¶ 88. Dr. Johnson also reviewed the analysis of local calling scopes that is described in the Hagans Affidavit. Id., ¶ 94.

detail in the Johnson Affidavit.¹³⁰ As a result of subdividing these two PUCO-defined markets, the ten markets as to which SBC Ohio was challenging impairment would be divided into fourteen markets in which impairment should be measured.

VI. THE ACTUAL DEPLOYMENT TESTS (SBC)

SBC Ohio asserted that in 10 of the 23 markets in its territory, three or more CLECs were serving mass market customers through their own switches, and hence the retail deployment trigger was met in those markets.¹³¹ The record, however, shows that SBC Ohio's claims were unsupported. The number of "triggering" CLECs asserted by SBC Ohio ranged from four (4 markets), to six (2 markets), seven (1 market), eight (1 market), nine (1 market) and ten (1 market).¹³² Most of these CLECs, however, could not actually be used to meet a mass market trigger, much less a trigger for the residential market on a stand-alone basis.

First: Of the 13 different CLECs that SBC Ohio asserted were serving mass market customers, 5 disclaimed serving mass market customers through their own switches.¹³³ Four CLECs serve a few "legacy" mass market customers and/or do not market to mass market customers. One CLEC serves only a "de minimis" number of customers in one of the markets.¹³⁴

Excluding these CLECs from the mass market count leaves only four SBC Ohio markets that

¹³⁰ The markets are SBC Ohio Market 7, within the Cleveland MSA (id., ¶¶ 95-97) and 13, within the Columbus MSA. Id., ¶¶ 98-101.

¹³¹ Hagans Affidavit, ¶ 37 and Attachment KLH-5. As discussed above, the Commission should presume that there is impairment in all wire centers other than those included in SBC Ohio's 10 markets.

¹³² Id., Attachment KLH-5.

¹³³ Id.

¹³⁴ Id.

could meet the mass market triggers.¹³⁵

But that does not end the matter. In those markets, the facilities-based service from most of the triggering CLECs is **not** service to the residential product market, but instead is service to small business customers.¹³⁶ **When the residential and small business markets are examined separately -- as they should be -- there is not one wire center in SBC Ohio territory in which the trigger is pulled for residential customers.**¹³⁷ Two markets have two CLECs serving residential customers with their own switches, and five markets have a single CLEC serving residential customers with its own switch.¹³⁸

These numbers show that under the Commission-designated actual deployment trigger -- the best evidence of lack of impairment -- CLECs are impaired without access to mass market switching, especially for residential service, throughout SBC Ohio territory. The Commission should so find.

VII. THE POTENTIAL DEPLOYMENT TEST (CBT)

As previously noted, CBT did not challenge impairment based on actual deployment of competitive switches. Such a challenge would, of course, have been unavailing: The Ohio record shows clearly that CLECs were not serving mass market customers using their own switches in CBT's markets. According to CBT's discovery responses, there is only one wire

¹³⁵ Id.

¹³⁶ Id.

¹³⁷ Id.

¹³⁸ Id.

center in one of CBT's markets where three CLECs serve mass market customers using their own switches, and only one other, in the same market, that has two switch-based CLECs.¹³⁹ The remaining wire 21 wire centers in that market have only one or no switch-based CLEC.¹⁴⁰ There are no CLECs using their own switches to serve mass market customers in the other three CBT markets where CBT challenged the impairment finding.

CBT thus fell back on a potential deployment test, and attempted to show that CLECs could economically compete using their own switches -- even though only three actually were competing, as just described. CBT's expert witness, Dr. Larry Darby, performed an analysis that purported to show a positive net present value ("NPV") for such service in three of CBT's markets.¹⁴¹

Dr. Darby's analysis was very sensitive to changes in the inputs and assumptions.¹⁴² When key inputs -- time frame of the NPV analysis, number of access lines gained by the CLEC, monthly revenue per access line, and cost of capital -- are set at more reasonable levels, the NPV analysis turns negative for all four markets.¹⁴³

Indeed, if only one of the assumptions -- the time frame of the NPV analysis -- is changed, the results are significantly different. CBT's witness conducted his analysis using a **15 year** period.¹⁴⁴ No CLEC would use such a long period as the key decision for competitive

¹³⁹ Hardie Affidavit, ¶ 17.

¹⁴⁰ Id.

¹⁴¹ Id., ¶ 37.

¹⁴² Id., ¶ 40.

¹⁴³ Id., Schedule KJH-1.

¹⁴⁴ Id., ¶ 41.

entry.¹⁴⁵ CBT itself uses a three-year period for discretionary spending projects.¹⁴⁶ Using a five year time frame turns the NPV for three of CBT's markets negative, and the fourth market has a net present value for five years of \$415,000 dollars,¹⁴⁷ on a total expenditure of some 41 million dollars.¹⁴⁸

CBT's attempt to show that CLECs providing their own switching in CBT's markets would be economic is foiled at first by the lack of actual switched-based competition. But it is also foiled by the unreasonable assumptions of CBT's NPV studies.

VIII. CONCLUSION

The Commission should find that the residential product market for switching should be reviewed separately from the small business market. Only in this fashion will the greater competitive facilities-based opportunities for small business customers not mask the limited or non-existent service to residential customers through CLEC switches.

The Commission should, for Ohio, adopt the geographic markets proposed by the OCC, which consist of contiguous clusters of wire centers that have relatively homogeneous characteristics. Certainly, the Commission should not adopt larger geographic markets, such as MSAs, LATAs, or entire ILEC territories within the state.

The Commission should, for Ohio, determine that, for those ILECs which did not

¹⁴⁵ Id., ¶ 47.

¹⁴⁶ Id.

¹⁴⁷ Id., ¶ 45.

¹⁴⁸ See CBT case (04-35), prefiled testimony of Larry F. Darby.

challenge the Commission's impairment finding for mass market switching, the impairment finding stands, and those ILECs must unbundle local switching. The same principle should apply to the markets/wire centers of SBC Ohio and CBT where those ILECs did not challenge impairment.

In the end, the Commission should find that, for residential customers, SBC Ohio has failed to demonstrate a lack of impairment -- because of the lack of switched-based CLECs servicing those customers -- in any of the markets where SBC Ohio challenged the impairment finding. Even for the mass market as a whole, impairment exists in only four SBC Ohio markets, based on the Commission's competitive triggers.

CBT, of course, can only point to minimal CLEC switched-based activity in its territory. This is surely the result of the fact -- as demonstrated by CBT's witness' models with more reasonable assumptions -- the NPV of such competitive service is negative in all of CBT's challenged markets. The Commission should also find impairment throughout CBT territory. The Commission should also find impairment for ULS wherever in Ohio the ILEC -- SBC Ohio, CBT or any other ILEC -- did not challenge the Commission's impairment finding.

Respectfully submitted,

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